

TOMIO B. NARITA (SBN 156576)
JEFFREY A. TOPOR (SBN 195545)
SIMMONDS & NARITA LLP
44 Montgomery Street, Suite 3010
San Francisco, CA 94104-4811
Telephone: (415) 283-1000
Facsimile: (415) 352-2625
tnarita@snllp.com
jtopor@snllp.com

Attorneys for Defendants
and Unifund CCR Partners and
Steven A. Booska

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JASON E. DAVIS.

) CASE NO.: 3:07-CV-01767 SI

Plaintiff,

NOTICE OF MOTION AND

VS

**NOTICE OF MOTION AND
MOTION OF DEFENDANT
STEVEN A. BOOSKA TO DISMISS
SECOND CLAIM FOR RELIEF IN
COMPLAINT; MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION**

UNIFUND CCR PARTNERS, a corporation; STEVEN A. BOOSKA, an individual; and DOES 1 through 10 inclusive.

Date: June 8 2007

Date: June 3, 2013
Time: 9:00 a.m.

Time: 9:00 a.m.
Courtroom: 10 (19th Floor)

The Honorable Susan Ilston

Defendants.

1 TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 8, 2007, at 9:00 a.m., or as soon
3 thereafter as the matter may be heard in Courtroom 10 of this court, located at 450
4 Golden Gate Avenue, San Francisco, California, 94102, the Honorable Susan
5 Ilston presiding, defendant Steven A. Booska will and hereby does move this
6 Court for an Order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil
7 Procedure, dismissing the California state law claims asserted by Plaintiff in the
8 Second Claims For Relief contained in the Complaint filed herein.

9 This motion is made on the grounds that the state law claims under
10 California Civil Code § 1788 *et seq.*, (the “Rosenthal Act”) fail because they are
11 based upon alleged communications made in connection with a state court
12 collection action. The claims are absolutely barred by the litigation privilege, as
13 codified by the California legislature at section 47 of the California Civil Code.

14 This motion will be based upon this Notice of Motion and Motion, the
15 accompanying Memorandum of Points and Authorities in Support of the Motion,
16 upon all of the records on file in this action, and upon such other and further
17 evidence or argument that the Court may permit at the hearing in this matter.

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19 DATED: May 1, 2007

SIMMONDS & NARITA, LLP
TOMIO B. NARITA
JEFFREY A. TOPOR

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By: s/Tomio B. Narita
Tomio B. Narita
Attorneys for defendants

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 After he stopped making payments on his Citibank credit card account,
4 plaintiff Jason E. Davis (“Davis”), was sued in a state court collection action by
5 Citibank’s successor in interest, defendant Unifund CCR Partners (“Unifund”). In
6 that collection action, Unifund was represented by its counsel, defendant Steven
7 A. Booska (“Booska”; collectively, “Defendants”). On November 16, 2006,
8 Defendants caused the collection action to be dismissed.

9 On March 28, 2007, ten months after the collection action was filed against
10 him, Davis filed this case. Davis claims that the allegations made in Defendants’
11 collection complaint, violated the Fair Debt Collection Practices Act, 15 U.S.C. §
12 1692 *et seq.*, and the California Rosenthal Act, California Civil Code § 1788 *et*
13 *seq.* (the “Rosenthal Act”).

14 The Rosenthal Act claims filed by Davis are barred as a matter of law. The
15 California Supreme Court has repeatedly held that the contents of any pleading or
16 any communications made within or in connection with litigation are absolutely
17 privileged. Such statements cannot form the basis of any claim. Here, Davis’s
18 state law claims are based solely upon allegedly false or misleading statements
19 made in the collection complaint that was filed against Davis. These alleged
20 statements are absolutely privileged, and the state law claims under the California
21 Civil Code therefore fail as a matter of law.

22 Because the litigation privilege is absolute, it would be futile to grant Davis
23 leave to amend his state law claims. Defendant Booska respectfully requests that
24 this Court issue an Order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil
25 Procedure, dismissing the Second Claim for Relief as to Booska, with prejudice.
26

1 **II. ALLEGATIONS OF THE COMPLAINT**

2 On May 31, 2006, Defendants filed a collection action against Davis in the
 3 Superior Court of California, County of Stanislaus. Davis alleges that by filing the
 4 complaint in that action, Booska violated the Rosenthal Act when he allegedly
 5 “falsely represent[ed] the legal status of the Debt,” “falsely represent[ed] the
 6 amount of the Debt,” “us[ed] unfair or unconscionable means to attempt to collect
 7 a debt in suing on a time barred debt,” “attempt[ed] to collect on an amount of
 8 principal and interest not authorized by agreement or permitted by law,” and
 9 “attempt[ed] to collect attorneys’ fees not authorized by agreement or permitted by
 10 law.” *See* Complaint at ¶ 48. Davis further alleges that Booska violated the
 11 Rosenthal Act by “violating 15 U.S.C §1692d”; that by filing the collection action,
 12 Booska was engaging in conduct the natural consequence of which is harassment,
 13 oppression or abuse of a debtor. *See id.* Davis’s entire Rosenthal Act claim arises
 14 out of the statements allegedly made in Unifund’s collection complaint filed by
 15 Booska in the Superior Court. *Id.* at ¶¶ 29-43.

16

17 **II. ARGUMENT**

18 **A. Standards Applicable To A Motion To Dismiss**

19 Where, as here, “it appears beyond doubt that the plaintiff can prove no set
 20 of facts in support of his claim which would entitle him to relief,” the Court may
 21 grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See*
 22 *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-102, 2 L.Ed. 2d 80 (1957).
 23 A dismissal under Rule 12(b)(6) can be based on either: 1) the lack of a cognizable
 24 legal theory; or 2) the absence of sufficient facts alleged under a cognizable legal
 25 theory. *See Smilecare Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d
 26 780, 783 (9th Cir. 1996); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530,
 27 534 (9th Cir. 1984).

1 While the Court must accept as true a plaintiff's material allegations and all
 2 reasonable inferences therefrom, *see NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 897
 3 (9th Cir. 1986), the Court need not accept as true conclusory allegations that are
 4 unsupported by the facts alleged, or that are couched in factual allegation, *see*
 5 *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992); *McGlincy v. Shell*
 6 *Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Adams v. Johnson*, 355
 7 F.3d 1179, 1183 (9th Cir. 2004) ("conclusory allegations of law and unwarranted
 8 inferences are insufficient to defeat a motion to dismiss").

9 **B. California's Litigation Privilege Provides An Absolute Bar To
 10 Liability Based Upon Alleged Communications Made In
 Pleadings Or In Connection With Judicial Proceedings**

11 California courts and the California legislature have long recognized that
 12 the contents of any pleading – as well as any communications made during or in
 13 connection with judicial proceedings – are absolutely privileged, and may not
 14 form the basis of any subsequent claim against the speaker. "For well over a
 15 century, communications with 'some relation' to judicial proceedings have been
 16 absolutely immune from tort liability by the privilege codified as section 47(b)." *Rubin v. Green*, 4 Cal. 4th 1187, 1193 (1993).¹ The principal purpose of the
 17 privilege is "to afford litigants and witnesses the utmost freedom of access to the
 18 courts without fear of being harassed subsequently by derivative tort actions."
 19 *Silberg v. Anderson*, 50 Cal. 3d 205, 213 (1990) (citations omitted). The privilege
 20 is also designed to "encourage open channels of communication and zealous
 21 advocacy, to promote complete and truthful testimony, and to avoid unending
 22 litigation." *Jacob B. v. County of Shasta*, 56 Cal. Rptr. 3d 477, 483, 154 P. 3d
 23 1003 (Cal. 2007), quoting *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1063 (2006).

25
 26 ¹ Section 47(b) of the California Civil Code provides in relevant part as
 27 follows: "A privileged publication or broadcast is one made: . . . (b) In any (1)
 28 legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding
 authorized by law . . ." Cal. Civ. Code § 47(b).

1 The usual formulation of the contours of the privilege was stated by the
 2 California Supreme Court in *Silberg* as follows:

3 The privilege applies to any communication (1) made in judicial or quasi-
 4 judicial proceedings; (2) by litigants or other participants authorized by law;
 5 (3) to achieve the objects of the litigation; and (4) that have some
 connection or logical relation to the action.

6 *Id.* at 212.

7 The Supreme Court has made clear that the contents of all pleadings and
 8 process involved in any litigation are privileged communications and may not
 9 form the basis of any claim. *See, e.g., Rusheen v. Cohen*, 37 Cal. 4th at 1058
 10 (privilege applies to false or perjurious testimony or pleadings); *Rubin*, 4 Cal. 4th
 11 at 1195 (privilege barred claims based on contents of pleadings and amended
 12 pleadings). Indeed, the privilege extends beyond the contents of formal pleadings,
 13 and

14 applies to any publication required or permitted by law in the course of a
 15 judicial proceeding to achieve the objects of the litigation, **even though the
 publication is made outside the courtroom and no function of the court
 or its officers is involved.**

16 *Silberg*, 50 Cal. 3d at 212 (emphasis supplied).

17 The broad application of the privilege has been deemed essential to ensuring
 18 the integrity of the judicial process. *See Silberg*, 50 Cal. 3d at 214-15 (describing
 19 the privilege as “the backbone to an effective and smoothly operating judicial
 20 system”). For this reason, California courts have given the privilege an expansive
 21 reach, using it to bar both statutory and tort causes of action, with a single
 22 exception for malicious prosecution suits. *See id.* at 215-16; *see also Olszewski v.
 23 Scripps Health*, 30 Cal. 4th 798, 831-32 (2003) (litigation privilege barred alleged
 24 class claims asserted under Business & Professions Code § 17200); *Rubin*, 4 Cal.
 25 4th at 1200-04 (privilege barred claim for alleged violations of Business &
 26 Professions Code § 17200); *Ribas v. Clark*, 38 Cal. 3d 355, 364-65 (1985)
 27 (privilege barred claim for damages arising from alleged violations of Privacy Act,
 28

1 Penal Code §§ 630, *et seq.*); *Carden v. Getzoff*, 190 Cal. App. 3d 907, 909 n. 2
 2 (1987) (privilege barred claim for fraud and deceit); *Steiner v. Eikerling*, 181 Cal.
 3 App. 3d 639, 642-43 (1986) (privilege barred claim based on publication of forged
 4 will prepared for probate); *Portman v. George McDonald Law Corp.*, 99 Cal. App.
 5 3d 988, 989-90 (1979) (privilege barred claim for negligent misrepresentation).
 6 Indeed, the California Supreme Court recently held that the privilege barred a
 7 claim based upon the constitutional right to privacy. *See Jacob B.*, 56 Cal. Rptr.
 8 3d at 488 (“The same compelling need to afford free access to the courts exits
 9 whatever label is given to a privacy cause of action.”).

10 Federal courts in California have repeatedly applied the privilege to bar
 11 state law claims – including Rosenthal Act claims – arising out of communications
 12 occurring within collection actions. *See, e.g. Sengchanthalangsy v. Accelerated*
 13 *Recovery Specialists, Inc.*, 473 F. Supp. 2d 1083 (privilege barred claims for fraud,
 14 negligence and violations of Cal. Bus. & Prof. Code § 17200 based upon allegedly
 15 false affidavit used in connection with collection action); *Taylor v. Quall*, 458 F.
 16 Supp. 2d 1065, 1067-68 (C.D. Cal. 2006) (privilege barred Rosenthal Act claim
 17 and § 17200 claim based upon allegedly false statements made in connection with
 18 collection litigation).²

19

20 ² Even if Davis sought leave to amend based upon prelitigation
 21 communications, his claim would still fail. In addition to pleadings and process
 22 involved in the litigation, the litigation privilege also “has been broadly construed to
 23 apply to demand letters and prelitigation communications by an attorney.” *Knoell v.*
Petrovich, 76 Cal. App. 4th 164, 171 (1999) (privilege barred claim based on
 24 statements made in attorney’s demand letter); *see also Rubin*, 4 Cal. 4th at 1194-95
 25 (statements in attorneys’ pre-litigation notice of intent to sue were protected by the
 26 privilege); *Home Ins. Co. v. Zurich Ins. Co.*, 96 Cal. App. 4th 17, 24 (2002) (privilege
 27 barred claims based upon statements made by counsel during settlement
 28 negotiations); *Larmour v. Campanale*, 96 Cal. App. 3d 566, 569 (1979) (attorney’s
 demand letter held privileged); *Lerette v. Dean Witter Org., Inc.*, 60 Cal. App. 3d 573,
 577-78 (1976) (“Therefore, we hold that a demand letter such as that sent by Dubow

1 **C. The Second Claim For Relief Is Based Upon Alleged Statements
2 Made In A Complaint In Connection With The State Court
3 Collection Action And Therefore Fail As A Matter Of Law**

4 The only conduct complained of in the Complaint is the filing of and the
5 statements made within the state court collection action. All of the allegations
6 made to support Davis's claims under the Rosenthal Act are based upon
7 statements made in that collection complaint. The state law claims are therefore
8 based solely upon communications made within or in connection with the
9 collection action. Davis's Second Claims for Relief falls squarely within the bar
of the litigation privilege. The claims fail.

10 Davis alleges that the collection complaint falsely represented the debt's
11 legal status, falsely represented the amount of the debt, improperly sought to
12 recover on a time-barred debt, attempted to collect on an amount of principal and
13 interest not authorized by agreement or permitted by law, and attempted to collect
14 attorneys' fees not authorized by agreement or permitted by law. *See* Complaint
15 at ¶¶ 36, 39-40, 41, 48. By challenging these allegations – which are contained in
16 the collection complaint itself – Davis's state law claims run headlong into the
17 absolute bar of the litigation privilege. *See, e.g., Rusheen*, 37 Cal. 4th at 1062, 39
18 Cal. Rptr. 3d at 722 (abuse of process claims based upon filing of allegedly
19 perjured proofs of service barred by privilege); *Olszewski*, 30 Cal. 4th at 831-32,
20 135 Cal. Rptr. 2d at 28 (section 17200 claim based upon the filing of liens barred
21 by the privilege); *Albertson v. Raboff*, 46 Cal. 2d 375, 380-81 (1956) (slander of
22 title claim based on recording notice of lis pendens barred by privilege).

23 **IV. CONCLUSION**

24 The Rosenthal Act claims asserted by Davis are based exclusively upon
25 statements that were allegedly made in a collection complaint filed in the Superior
26 Court of California, County of Stanislaus. All communications made in

27
28 is fully privileged under section 47 as preliminary to a judicial proceeding.”).

1 connection with that litigation are absolutely privileged and cannot form the basis
2 of any claim against Booska. The privilege is absolute, and therefore any attempt
3 to amend the claims would be futile.

4 Accordingly, defendant Booska respectfully requests that this Court enter an
5 Order dismissing the Second Claim for Relief, with prejudice.
6

7 DATED: May 1, 2007

SIMMONDS & NARITA, LLP
TOMIO B. NARITA
JEFFREY A. TOPOR

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10
11 By: s/Tomio Narita
12 Tomio B. Narita
13 Attorneys for defendants
Unifund CCR Partners and
Steven A. Booska
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